SUPREME COURT
OF THE UNITED STATES
No._____
October Term, 1979

Supreme Court, U. S.
FILED
FEB 11 1980
MICHAEL RODAK, JR., CLERK

VICTOR J. BACKUS, 79-1249
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
LOS ANGELES SUPERIOR COURT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

Table of Authorities Cited ii
Introduction 1
Opinions Below 1
Jurisdiction 1
Questions Presented 2
Statement of the Case 2
Statement of the Facts 2
Statement of Proceedings 6

Reasons for Granting The Writ

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING BASIC PRINCIPLES OF DUE PROCESS OF LAW REQUIRING THAT LAWS PROHIBITING CONDUCT CONTAIN DEFINITE AND PRECISE STANDARDS. 8

2. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS AS TO WHETHER THE CONSTITUTIONALITY OF A LAW CAN BE A DEFENSE TO A CRIME BASED UPON THAT LAW. 12

3. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS AS TO WHETHER A CONVICTION FOR CONSPIRACY, A SPECIFIC INTENT CRIME, CAN STAND IN THE ABSENCE OF EVIDENCE OF SUCH INTENT 14

Conclusion..... 18

Appendix

Judgement..... 19

PROPOSED REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY and ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON PETITION FOR WRIT OF HABEAS CORPUS 21

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON PETITION FOR WRIT OF HABEAS CORPUS 39

Final Report and Recommendation..... 40

Notice of Lodging on Magistrate Report and Recommendation and Judgement 42

Motion for Leave to File Late Record 44

Proof of Service 45

TABLE OF AUTHORITIES CITED

CASES

California Association of Nursing Homes v. Williams
(1970) 4 Cal. App. 3d 800, 84 Cal Rptr. 590 9

Commonwealth v. Benesch,
156 Cal. App. 2d 784 320 P. 2d 70..... 14

Dennis v. United States
(1966) 384 U.S. 855, 877, 86 S. Ct. 1840, 1853... 12

Dombrowski v. Pfister,
(1965) 380 U.S. 479, 85 S. Ct. 1116..... 11

Hewitt v. State Board of Medical Examiners,
148 Cal. 590, 84 P. 39 10

McMurty v. State Board of Medical Examiners
(1960) 180 C.A. 2d 760, 762, 4 Cal. Rptr. 910, 913 9

Mitchell v. Superior Court
(1972) 28 C.A. 3d 759, 104 Cal. Rptr. 921 13

People v. Ashley
(1958) 42 C. 2d 246, 263, 267 P. 2d 271..... 15

People v. Bowman
156 Cal. App. 2d 784 320 P. 2d 70..... 14

People v. Horn
1974, 12 C. 3d 290, 115, Cal Rptr. 516, 524, P. 2d 1300 14

People v. McCaughan
(1957) 49 Cal. 2d 409, 411, 414, 317 P. 2d 974, 977 10

People v. Northern
(1940), 41 C.A. 2d 2840, 106 P. 2d 433..... 15

TABLE OF AUTHORITIES

Pierce v. United States
314 U.S. 507, 515 68 S. Ct. 665, 670 10
United States v. Harriss
(1945) 347 U.S. 612, 617, 74 S. Ct. 808, 812 11
Winters v. People of New York
(1948) 333 U.S. 507, 515 68 S. Ct. 665, 670 10

CODES

California Penal Code
Section 1118 7
28 U.S.C.
Section 1254 (1) 1
Section 2241 (a) 2

United States Constitutional Amendments Involved
Fifth Amendment 2
Fourteenth Amendment 2
Section I 2

TEXTS

Witkin, Cal. Crim. Chap. 2 14

SUPREME COURT OF THE UNITED STATES
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No. _____
VICTOR J. BACKUS, Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
LOS ANGELES SUPERIOR COURT, Respondent.
PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Victor J. Backus respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth District entered in this proceeding on November 14, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto. The District Court Judgment Adopting Report and Recommendation of United States Magistrate on Petition for Writ of Habaes Corpus appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 14, 1979 and this Petition Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a conviction based upon standards so vague that no man with common intelligence could know what conduct is prohibited is violative of the Due Process Clause of the Fourteenth Amendment?

2. Whether a conviction based upon a statute previously held unconstitutional is violative of the Due Process Clause of the Fourteenth Amendment?

3. Whether Petitioner was denied due process of law in that he was convicted in absence of any evidence of specific intent to violate the law?

STATEMENT OF THE CASE

I

JURISDICTION OF LOWER FEDERAL COURT

The basis for federal jurisdiction in the United States District Court, Central District of California was Petitioners denial of due process as provided for in the United States Constitution, Amendment V and Amendment XIV Section 1 via Habeas Corpus Writs, 28 U.S.C. Section 2241(a).

II

STATEMENT OF FACTS

DONALD W. GORMLY and RUTH K. GORMLY were the sole owners of Grandview Sanitarium, which was one

of seven such facilities either wholly or partially owned by them, containing some 711 beds, of which they had a total ownership interest in 384 beds. Grandview Sanitarium itself was licensed for 77 beds.

The GORMLYS joined with other owners of like facilities to form a group eventually consisting of 13 such institutions and totalling 1,081 beds.

DONALD W. GORMLY conceived of the notion of having one or more companies formed to provide various housekeeping or management services to the group of facilities with which he was associated, and consulted his attorneys, and his accountant, VICTOR BACKUS relative thereto.

The owner of the several facilities decided to set up five companies, referred to as "service companies", known as Excelsior Food, Adobe Maintenance, Crescent Rental, Pasco Management and Imperial Laundry. These companies were incorporated by an atorney, and BACKUS was hired to perform the accounting services.

These companies began to perform services which were essentially bookkeeping services consisting of payroll, the accounts receivable and the accounts payable. Instead of working for the hospitals the bulk of the personnel in the thirteen facilities were entered on the payroll of one or another of the service companies. Food handlers were in Excelsior, maintenance people in Adobe, laundry workers in Imperial, management office in Crescent, and the remainder in Pasco. Accounts payable were handled by the five companies on the basis of their functional breakdown.

The facilities reimbursed the service companies for the payroll and the accounts paid out by them. The only non-bookkeeping services actually performed by the "service companies" were the services rendered to the facilities by the employees who worked in the several facilities, and by the general manager in coordinating purchases, and of course the owners who were also on the service company payrolls.

At first the service companies had no income but after awhile they charged the facilities 25% of the face amount of all accounts payable processed by them. The evidence is conflicting, but there may also have been a 7% charge for the payrolls processed, but in any event, the prosecution admitted that such a fee would be legitimate, and it was not really an issue.

In 1968 the facilities no longer paid the owners a salary, as they had for many years, and the owners were reimbursed through the service companies in the form of service company salaries and consultant fees which had been charged to the facilities. As the court correctly observed, this was merely a way of channeling the facility profits to the owners, and it made no difference whether it was paid directly by the facilities or indirectly by the service companies.

From 1966 onward an increasing number of patients in the facilities came under the Medi-Cal program which was being administered by Blue Cross. The reimbursement to the facilities for Medi-Cal patients was partly pegged to the cost experience of each facility, and in figuring the

rate, Medi-Cal used a formula that was subsequently declared invalid by the courts. The Cost Report of Grandview Sanitarium for the period of February 1, 1968 through June 30, 1968 is the report in issue here and instead of salaries and other income directly to owners, the service company charges and consultant fees were shown as payments to the service companies in the various areas—administration, other departments, and nondepartments—in which they fell by reason of the fact that they were tied to expenditures in those areas.

The state took the position that this resulted in a higher rate being paid Grandview than would have been paid if the service companies did not exist, and that the Defendants had conspired to achieve this result in order to defraud the state.

The Defendants countered that the service companies were set up for legitimate purposes, and that if they resulted as well in functional reporting of profits, there was nothing objectionable in that.

Petitioner, BACKUS, for himself, contended that he was not involved in decision making, that he saw nothing fraudulent in reporting the 25% payables charge that was paid out to the owners, since that was facility profit that belonged to the owners, and that he did what any other accountant would do to carry out what he considered to be a lawful program of his employers.

III

STATEMENT OF PROCEEDINGS

The Petitioner, VICTOR J. BACKUS, was indicted along with DONALD E. GORMLY and RUTH K. GORMLY on July 21, 1971, and was named in all seven counts. There was one count of Criminal Conspiracy, two counts of Fraudulant Claim, and four counts of Grand Theft. The Criminal Conspiracy was alleged to have occured between November 1, 1966 and July 31, 1969, as stated in Count I. The overt acts of the conspiracy were alleged to have occured on or between the dates indicated in 13 specifications of overt acts. Count II charged DONALD W. GORMLY and VICTOR J. BACKUS with presenting a fraudulent claim to Blue Cross as agent for the State on December 26, 1967. Count III charged RUTH K. GORMLY and VICTOR J. BACKUS with the same type of offense on August 30, 1968. Count IV alleged that DONALD W. GORMLY, RUTH K. GORMLY and VICTOR J. BACKUS, between March 1, 1966 and July 31, 1969, feloniously took the property of another exceeding $200.00. Counts V, VI and VII repeated this charge for the dates respectively of January 1969, February 1969, and March 1969.

A jury trial was waived by all Defendants and trial commenced on February 25, 1972 before the Honorable Michael G. Price, Judge Pro Tem. After argument on Motion for Judgment of Acquittal, pursuant to Section

1118, Penal Code of the State of California, the Court dismissed Count II. On March 23, 1972, the Court found VICTOR J. BACKUS guilty on Counts I, IV, V, VI, and VII. On April 21, 1972, the Court granted a new trial as to Counts V, VI and VII and on Motion of the People those Counts were dismissed in furtherance of Justice. Sentence was entered on Counts I, III and IV and a written Notice of Appeal was filed on April 21, 1972, to the Court of Appeal, Second Appellate District for the State of California.

On October 24 1973, the Court of Appeal, Second Appellate District, affirmed the decision as to Count I and reversed the same as to Counts III and IV, on October 24, 1973.

On October 4, 1976, a Petition for a Writ of Habeas Corpus was filed with the Superior Court of the State of California and the same was denied on October 6, 1976.

A second Petition for Writ of Habeas Corpus was filed with the District Court of Appeal, State of California, Second Appellate District, on November 23, 1976 and the Petition was denied on December 16, 1976.

A Petition for Writ of Habeas Corpus was filed in the Supreme Court of the State of California on December 23, 1976 and the Petition was denied on February 11, 1977.

A Petition for Writ of Habeas Corpus by a Person in State custody was filed with the United States District Court, Central District of California, on March 15, 1977, accompanied by a Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus.

Pursuant to General Order 104-D, the proposed report and recommendation of Findings of Fact and Conclusion of Law, and proposed judgments, was lodged by Magistrate Harvey A. Schneider on July 18, 1977. United States District Judge William P. Grey signed and filed an Order entitled Order Adopting Report and Recommendation of the United States Magistrate on the Petition for Writ of Habeas Corpus on August 30, 1977.

An Application for Certificate Probable Cause was filed on August 29, 1977 and the Notice of Appeal was filed on October 5, 1977. District Judge William P. Grey entered an Order granting the Application for Certificate of Probable Cause on September 11, 1977. On November 14, 1979, the United States Court of Appeals for the Ninth Circuit, affirmed the decision of the United States District Court for the Central District of California.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING BASIC PRINCIPLES OF DUE PROCESS OF LAW REQUIRING THAT LAWS PROHIBITING CONDUCT CONTAIN DEFINITE AND PRECISE STANDARDS.

Petitioner's argument arises out of the Medi-Cal regulations relating to reimbursable costs for services performed. Petitioner hereby asserts that said regulations

were so vague and uncertain that the costs for which reimbursement could be sought were not reasonably determinable.

The California Court of Appeals, in 1970, ruled that the Medi - Cal regulations governing reimbursement of nursing homes were invalid. **California Association of Nursing Homes v. Williams,** (1970) 4 Cal.App.3d 800, 84 Cal.Rptr. 590. The rationale for the holding therein was based upon a finding that the Medi-Cal administrator failed to hold hearings in order to establish the existence of a factual basis for such regulations.

The Administration in determining the rates of reimbursements to nursing homes under the Medi-Cal programs created a situation wherein there were no ascertainable standards by which one could determine the legality of conduct, nor by which the Court could conclude that Petitioner engaged in conspiracy.

The regulations did not establish a standard for reimbursing nursing homes, but rather, incorporated by reference "The Schedule of Maximum Allowances" published by the State Department of Finance.

The California Supreme Court stated in **McMurty v. State Board of Medical Examiners,** (1960) 180 C.A.2d 760, 762, 4 Cal.Rptr. 910,913: "It is well settled that a statute which either forbids, or requires the doing of an act in terms so vague that men of common intelligence must neccessarily guess at its meaning and differ as to its application violates the first essential of due process of law." This principle applies not only to statutes of a penal

nature but also to those prescribing a standard of conduct which is the subject of administrative regulations. **Hewitt v. State Board of Medical Examiners,** 148 Cal. 590, 84 P. 39. Additionally, as stated in **People v. McCaughan** (1957) 49 Cal.2d 409, 411, 414, 317 P.2d 974, 977: "Language used in such legislation must be definite enough to provide a standard of conduct for those whose activities are prescribed as well as a standard by which the agencies called upon to apply it can ascertain compliance therewith."

In the instant case, however, the statutes, regulations and directives were intended solely to aid in the conduct of a civil order. In dealing with criminal prosecutions, the legislative standards must be more specifically enumerated. In **Winters v. People of New York** (1948) 333 U.S. 507, 515 68 S.Ct. 665, 670, the U.S. Supreme Court stated: "The standards of certainty in statutes punshing for offenses is higher than those depending primarily upon civil sanctions for endorsement. Crime must be defined with appropriate definiteness. **Pierce v. United States,** 314 U.S. 306, 311, 62 S.Ct. 237, 239, 86 L.Ed. 226 [other cites omitted]."

The U.S. District Court in answer thereto stated that it recognized that the Medi-Cal program had difficulty at its inception in determining per diem rates that the State would pay and that there were constant changings of regulations and statutory provisions. The Court concludes, however, that "No regulation, or schedule, or accounting practice, recognized the validity of inflating

accounts payable retroactively by a mark-up process as was done in this case or charging consultation fees when there were no documents to substantiate the necessity therefore, or of the value to be assigned to the consultation." However, this fails to answer the question. Petitioner contends that no standard existed. If as stated a statute containing imprecise language is void for vagueness it is a fortiori that a statute containing no standards by which to guide those regulated thereunder is violative of due process. Therefore, persons are immuned from regulation thereunder even though their conduct is not constitutionally protected—i.e., even if they could be regulated by a statute drawn with the requisite specificity. **Dombrowski v. Pfister** (1965) 380 U.S. 479, 85 S.Ct 1116. As stated in **United States v. Harriss** (1945) 347 U.S. 612, 617, 74 S.Ct. 808, 812: "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."

The Court, however, merely states that there existed no statute authorizing the alleged activity. This is merely to say that Petitioner is incapable of establishing some statutory authority for said conduct. There is a complete failure by the Court, to determine whether or not the regulations were sufficiently definite that men of common intelligence would be capable of conforming their conduct thereto.

Petitioner, contrary to the Court's conclusion, could not be determined to have improperly or unlawfully obtained

monies to which he was not otherwise entitled by submitting false and manufactured evidence, nor could conspiracy to obtain these same results be determined to have existed. The statutory scheme which, standing alone, forms the basis for the prosecution is unconstitutional. It must be noted that the interrelationship of nursing home and companies which provide services to that home was specifically allowed by the Department of Health Care Services. It is clear that the rates in existence during the time in question were only interim rates and were set up with the idea that a final settlement regarding payments would not be reached until the complete audit of the facility in question. With this factual basis in mind, absent clear evidence of falsification, what evidence points to fraud? The answer is that there is no evidence.

2. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS AS TO WHETHER THE CONSTITUTIONALITY OF A LAW CAN BE A DEFENSE TO A CRIME BASED UPON THAT LAW.

In Dennis v. United States, (1966) 384 U.S. 855, 877,86 S.Ct. 1840, 1853, the Court upheld the conviction of conspiracy to defraud by filing false claims. Although the majority refused to consider the argument that the section involved was unconstitutional, the concurring opinion stated, "It is indeed a novel doctrine, that the constitutionality of a law which forms the very nucleus of a criminal

charge cannot be a defense to that charge . . . Future historians reporting this case may justifiably draw an inference that it is the Petitioners, whatever may be their offense, and not the Government who has been frauded."

The supporting theory to this doctrine was based upon the Petitioner's choice to "subvert" rather than challenge the law. However, it has been pointed out that this distinction is overly severe and yet another reason to rid our system of conspiracy charges separate from substantive offenses.

It should be noted that Petitioners co-defendants pursued a successful, but incomplete challenge in **Californin Association of Nursing Homes v. Williams, supra.**

In any case, California law appears to support the argument that Petitioner's challenge was proper. It has long been settled that a void Court Order is never binding and its violation cannot constitute a contempt. See **Mitchell v. Superior Court** (1972) 28 C.A.3d 759, 104 Cal.Rptr. 921.

The trial Court determined that the constitutionality of the statute (i.e. Maximum Schedule of Benefits) was irrelevant. The basis for this conclusion was that Petitioner was convicted of conspiracy to commit grand theft and/or false claims. Clearly the Court was in error. The question of reasonable rates and costs goes to the very heart of the prosecution's case. In the absence of any legal and constitutional method of reimbursement, let alone a standard upon which to base the measure of reimburse-

ment, it cannot be said that Petitioner intended to violate such standard.

3. THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS AS TO WHETHER A CONVICTION FOR CONSPIRACY, A SPECIFIC INTENT CRIME, CAN STAND IN THE ABSENCE OF EVIDENCE OF SUCH INTENT.

A criminal conspiracy requires a specific intent to commit an unlawful act **Witkin,** Cal. Crim. Chap. 2 Section 108 Pages 103-105 (2d 1968). Since the burden, as with all elements of an offense is with the prosecution, such intent cannot simply be presumed from the mere commision of an unlawful act **People v. Bowman,** 156 Cal. App. 2d 784 320 P. 2d 70.

Therefore, even though it may be shown that an alleged conspiracy has as its object the commission of an offense which can be consumated without any specific intent, there can be no criminal conspiracy absent a specific intent to violate the law. Thus, for example, to uphold the conviction for conspiracy to commit a "public welfare offense" it must be shown that the accused knew of the law and intended to violate it. **Commonwealth v. Benesch,** 290 Mass. 125, 194 N.E. 905. This requirement has been amplified to include a requirement that "the prosecution must show not only that the conspirators intended to agree, but also that they intended to commit the elements of that offense." **People v. Horn,** 1974, 12 C.3d 290, 115, Cal.Rptr. 516, 524, P.2d 1300.

It is the burden of the Government to **prove** the

necessary mens rea (i.e. criminal intent), and this responsibility cannot be lightly borne, as the Court said in **People v. Ashley** (1958) 42 C.2d 246, 263, 267 P.2d 271.

"Specific intent is also an essential element of many crimes. Moreover, in cases of obtaining property by false pretenses, it must be proved that any misrepresentations of fact alleged by the People were made knowingly and with intent to decieve. If such misrepresentations are made innocently or inadvertently, they can no more form the basis for a prosecution for obtaining property by false pretenses than can an innocent breach of contract."

"Whether the breach is a false promise or a misrepresentation of fact, the Defendants intent must be proved in both instances by something more than mere proof of non-performance or actual falsity." The object of this conspiracy must be an unlawful act. Where the purpose is wholely lawful, a charge of conspiracy cannot transform it into a crime **People v. Northern,** (1940), 41 C. A.2d 2840, 106 P.2d 433.

An analysis of the evidence regarding Petitioner's involvement is as follows:

Petitioner was hired as an accountant and participated in the accounting decisions for the inter-related companies. He believed that the purpose of the companies was to obtain trade discounts by combined purchasing. He had no knowledge that the effect of the mark-up would result in increased profits for the owners. He believed that in

accordance with strict accounting principals, he was requireds to report all costs as they appeared on the facilities books.

The People contend that Petitioner should have known that something fraudulent was being done. It is clear, however, that there is little evidence, if any, which establishes either expressly or inferentially that this was the case.

The District Court, in adopting the Report of Magistrate Schneider, makes reference to the fact that there was testimony by Stephen Smith, a staff auditor for an accounting firm who performed audits upon the cost statements furnished to Blue Cross by the Grandview Sanitarium, that the billings made by the service companies to the Nursing Homes had been marked up 25% higher than the original billings made by third-party suppliers of goods or services. The opinion, however, fails to tell us in what manner this is relevant to a finding of specific intent. Until such time as the twenty-five percent mark-up is tied in and connected with other evidence showing that it was done fraudulently, the amount of the mark-up is irrelevant, whether the same be .25% or 2500%. There is no evidence from which the inference can be drawn that the 25% mark-up was unreasonable nevertheless fraudulent.

The evidence is clear that the service company concept was authorized. In the absence of any evidence of Petitioner's picunary interest or other involvement other than performing the normal, ordinary services of an accountant

in and for and on behalf of Grandview an the inter-related service companies, it is unreasonable for the People to contend that Petitioner should have known that what was being done was fraudulent. And, the District Court, in adopting the Report of the Magistrate acted unreasonably in determining that the People had met their burden in proving the element of specific intent.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Ninth Circuit Court.

Respectfully submitted,

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DATE: SEP 24 1977

LODGED
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CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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BY DEPUTY

ENTERED
SEP 9 1977
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VICTOR J. BACKUS	)	
	)	
Petitioner	)	No. CV 77-972-WPG(S)
	)	JUDGMENT
-vs-	)	
	)	
LOS ANGELES	)	
SUPERIOR COURT,	)	
et al.,	)	
Respondent	)	

The Court has this date signed and filed an order entitled Order Adopting Report and Recommendation of

United States Magistrate on Petition for Writ of Habeas Corpus.

Pursuant thereto, the Court grants judgment against petitioner and in favor of respondent. Each party will bear his own costs.

Dated _____

_____

WILLIAM P. GRAY
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VICTOR J. BACKUS,	)	No. CV 77-972-WPG(S)
	)	
Petitioner	)	PROPOSED REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY and ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON PETITION FOR WRIT OF HABEAS CORPUS
	)	
-vs-	)	
	)	
LOS ANGELES superior court, et al.,	)	
	)	
Respondent	)	
	)	
	)	
_____	)	

This Report and Recommendation is submitted to the Honorable William P. Gray, United States District Judge, Pursuant to the provisions of 28 U.S.C. §636(b) (3) and General Order No. 104-D of the United States District Court for the Central District of California.

On March 15, 1977 petitioner filed his petition for writ of habeas corpus. Although petitioner is not in custody, the fact he was placed on probation following conviction constitutes sufficient "custody" to permit this Court to entertain his petition. **Jones v. Cunningham,** 371 U.S.

236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) In the petition the People of the State of California and the Los Angeles Superior Court are named respondents.

On April 8, 1977 a Return to Petition for Writ of Habeas Corpus was filed on behalf of "Petitioner's Probation Officer." (Return, p. 1)[1] On April 28, 1977 petitioner filed his Traverse to Return to Petition for Writ of Habeas Corpus.

On May 26, 1977 the cause came on for oral argument. Following oral argument respondent lodged, pursuant to the Magistrate's order, all of the volumes of the Reporter's Transcript which had not been previously lodged.

On June 7, 1977 the Magistrate issued an order which provided in part as follows:

> "In the Slip Opinion rendered by the California Court of Appeal in connection with petitioner's direct appeal to that court, there is set forth what purports to be the court's summary of the evidence adduced at petitioner's trial. Reference is specifically made to page 3 of the Slip Opinion (commencing five lines from the bottom of that page) through the first full paragraph of page 9, and again commencing on page 16 (second full paragraph) through the twelth line on page 18.
>
> "Within ten days from the date of this Order, petitioner IS ORDERED to file with the Court a statement indicating whether he agrees or disagrees

[1] Although petitioner's probation officer was not named respondent in the petition, at oral argument the parties stipulated that the Chief Probation Officer of the County of Los Angeles be made a party to this action and that the return be deemed filed on his behalf.

that the factual summary set forth by the Court of Appeal (as referred to above) is a correct one . . ."

On June 24, 1977 petitioner filed his response to the Magistrate's above referred to minute order. In this response petitioner indicated he agreed with all of the Court of Appeal's factual summary, except the first two sentences of the second full paragraph on page 16 of the Slip Opinion. Petitioner stated he could not agre with the statements contained in these two sentences because in petitioner's opinion, the statements by the Court of Appeal were conclusory.

The cause now stands submitted.

On July 21, 1971 an indictment was returned against petitioner and two co-defendants. Count one of the indictment charged petitioner and his co-defendants with violating Penal Code §182.1 (conspiracy). In count two petitioner and one co-defendant were charged with violating Penal Code §72 (presenting a fraudulent claim). In count three petitioner and his other co-defendant were charged with violating Penal Code §72. Counts four through seven charged petitioner and both co-defendants with violating Penal Code §487.1 (grand theft).

Petitioner's motion to dismiss count two was granted by the court at the conclusion of a non-jury trial. (CT 43) Thereupon, the court found petitioner guilty on counts one and three through seven, inclusive. On April 21, 1972 proceedings were suspended and petitioner was placed on probation for five years. Petitioner's motion for a new trial was granted as to counts five, six and seven. Following petitioner's appeal from the judgment. the California

Court of Appeal affirmed the judgment as to count one and reversed it as to counts three and four. In light of the foregoing, only petitioner's conviction on count one (conspiracy to commit grand theft and submit false claims) is before the Court in this habeas corpus proceeding.

Petitioner attacks his conviction on several different grounds, each of which will be discussed seriatim in the following paragraphs.

Petitioner first claims he was denied due process of law because he "was convicted in the absence of any evidence bearing on a requisite element of the offense, i.e., specific intent." (Petition, p. 5)

Initially, it must be observed that it is not sufficient in this habeas corpus proceeding for petitioner to prove the evidence against him was weak or conflicting. **Ortiz v. Craven,** 442 F. 2d 418 (9th Cir. 1971); **Phillips v. Pitchess,** 451 F.2d 913 (9th Cir. 1971) Rather, petitioner must prove that the charge against him was "so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process clause of the XIV Amendment." **Thompson v. City of Louisville,** 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960). As the court pointed out in **Thompson,** "this question turns not on the sufficiency of the evidence, but whether this conviction restis upon any evidence at all." (362 U.S. at p.199).

Moreover, it was for the trier of fact to resolve evidentiary conflicts and to draw reasonable inferences therefrom. In this connection it is important to note that a trier of fact may draw an inference of criminal intent from

circumstantial evidence **U.S. v. Kaplan,** No. 76-1319 (9th Cir., May 26, 1977).

It must be remembered that petitioner presently stands convicted of only one criminal offense, to wit, conspiracy to commit grand theft and submit false claims. As was pointed out by the California Court of Appeal on petitioner's direct appeal to that court, "a conspiracy is a criminal partnership between two or more persons, the design and object of which is to do an unlaw (sic) act or series of unlawful acts or to do a lawful act or series of lawful acts by unlawful means accompanied by an overt act to effect the object of such agreement. (See generally 1 Witkin, California Crimes, Conspiracy §105, p. 99). 'The existence of a conspiracy . . . may be proved by circumstantial as well as direct evidence [and] may be inferred from all the circumstances . . . .' (11 Cal. Jur. 2d Conspiracy, §30, pp. 250, 251.)" (Slip Opinion, pp. 15-16).

In its unpublished opinion (which is attached as Exhibit "A" to the Return), the California Court of Appeal summarized the evidence adduced at petitioner's trial as follows:[2]

> "Defendant Gormly [one of petitioner's co-defendants] and members of his family were the sole owners of six nursing homes and part owners fo seven others. Gormly and his wife were the sole stockholders of the Grandview Enterprises, Inc., which operated Grandview Sanitarium during the years 1964 thru 1969. Sometime in 1966 Gormly and other persons who

[2]As indicated above, with minor exceptions, petitioner concedes that the Court of Appeal correctly summarized the evidence adduced at his trial.

owned interests in various nursing homes formed five service companies: Crescent Rental Services, Paso Management Service, Excelsior Food Service, Imperial Linen Services and Adobe Maintenance Services, ostensibly for the purpose of performing certain services to nursing homes.

"Defendant Backus was the supervising accountant for all the Gormly nursing homes as well as the service companies.

"Patients who used the facilities of the Grandview Sanitarium included many being supported under the Medi - Cal program, as well as patients who paid their own expenses."

"Commencing in February 1966 the State of California contracted with Blue Cross to act as a fiscal intermediary between the State and the nursing homes in the processing of claims for monies owed the nursing homes for the care of Medi - Cal patients. Some of its functions included verifying claims, auditing, rate determinations and related activities.

"In order to establish a per diem rate which the State would pay for each Medi - Cal patient who obtained nursing care, the homes were required to submit a 'cost statement' to Blue Cross which was to reflect the costs actually incurred in caring for patients. These costs were broken down into departmental expenses such as accounting fees, salaries, linens, foods supplies, utilities and the like, and costs inherent in the ownership of the home, such as property taxes, lease payments, depreciation and interest.

"The owners of the nursing homes and their accountants were required to sign and verify these cost statements. Blue Cross then reviewed them, and by the application of such factors as occupancy, number of beds available, the number of days covered on the cost statement and other factors, it arrived at a per diem rate that the State would pay for the care of Medi - Cal patients. This rate was used in billing the State for such Medi - Cal services as were rendered by the particular nursing home.

"The State provided Blue Cross with certain guidelines from time to time as the Medi - Cal program was in its infancy, and eventually the State prepared a "Schedule of Maximum Allowances" (see **California Assn. of Nursing Homes, etc., Inc. v. Williams,** 4 Cal. App. 3d 800 808-809) which was furnished to each nursing home, and Blue Cross basically worked from it in determining allowable costs for particular nursing home expenditures. Generally, it described fixed levels of payment for specific services based on various formulae."

"After a claim has been submitted to Blue Cross by a particular nursing home, using the predetermined rate, and it had been approved by Blue Cross, the State paid the claim by warrant. This payment was in reality merely an advance payment against a final payment to be determined after an audit of the nursing home books of account to be undertaken at some future time."

"TESTIMONY AT TRIAL"

"Stephen Smith, a staff auditor for an accounting firm audited various cost statements furnished Blue Cross by the Grandview Sanitarium in the latter part of August 1970, We concern ourselves with the cost statement known as the "1968 Cost Statement", from which a per diem rate was established for claims to be made for the period February 1, 1968, through July 31, 1969. This 1968 cost statement covered the ongoing cost period from February 1, 1968 through June 30, 1968, and was submitted to Blue Cross on August 20, 1968."

"Smith testified that in the course of his audit he requested the original invoices for which payment had been made to various of the services companies for such items as food, laundry and supplies; that defendant Gormly indicated that he could not find them. They were eventually obtained in March or April 1971 pursuant to subpoena; that he discovered that all billings made by the service companies to the nursing homes had been marked up 25 percent higher than the original billings made by third - party supplier of goods or services; that an accounting fee paid to defendant Backus by Pasco Management Service had been marked up 25 percent when presented for payment by the service company to the nursing home; that payments for telephone bills, insurance premiums, and property tax installments, which were paid for by the service companies, were

likewise marked up 25 percent when presented for payment by the service company to the nursing home. We digress at this point to indicate that the "Schedule of Maximum Allowances" did not prohibit a nursing home from dealing with other businesses in which it had an interest, provided its charges were reasonable, and point out that Mr. Smith, in making his audit, used as a partial guide this same "Schedule of Maximum Allowances" which had been declared invalid in **California Assn. of Nursing Homes, etc., Inc. v. Williams, supra,** 4 Cal. App. 3d 800. Mr Smith further testified that he found that Gormly had been paid consultant fees by the service companies, but Smith could find no justification therefor; that employees were paid sick leave or vacation benefits but he was unable to document either type of benefit. In summary, Smith testified that based on his investigation and analysis the total dollar inflated costs for the 1968 cost period as a result of the 25 percent markups and the consulting fees was $32,500; for January 1969, $1,811 and for February 1969, $1,768."

"Robert Chambers, a certified public accountant, participated in audits of the service companies. He testified that he found consistent 25 percent markups in billings to the nursing homes; that he found defendant Gormly and his wife listed in various payroll records, journals, checks, invoices and purchase accounts; that in totalling various payments to Gormly and his wife out of various account headings, that Gormly had received from the

various service companies for the fiscal year 1968 the of $187,529.53 and his wife $50,849.47, and as direct salaries they had been paid an additional $100,000. Although the witness recognized the possibility of various tax advantages in withdrawing income out of the several service companies rather than out of the nursing home, he testified that in his opinion the service companies 'were devices to inflate the costs to the [nursing homes].' He based this opinion on the fact that the service companies had no assets such as buildings, equipment or rolling stock and had no capital investment. They did not act as principals in the buying of large quantities of food and risk loss or profit in doing so. They merely paid bills presented by purveyors of supplies or services to the rest home and marked the amount paid up and additional 25 percent in securing payment from the rest home."

"Defendant Gormly testified that the service companies were formed to achieve lower costs through group purchasing; that he was aware of the markups and the consulting fees charged; that the "Schedule of Maximum Allowances" did not provide for all types of allowances, and he, as well as other nursing home operators, were unsure as to what were acceptable cost items for which nursing homes would be reimbursed."

"Marlow Barr, a certified public accountant, testified for the defense that if the markup and the consulting fees were deducted from Grandview's 1968 cost

statement, the remaining departmental cost of $11.22 would be in excess of the maximum ceiling of $11.09, which was the per diem rate approved by Blue Cross." (Slip Op., pp. 3-9)

". . . Although articles of incorporation were drawn and filed [for the service corporatons], no stock was ever issued, and no corporate meetings were ever held (although minutes of non-existent meetings were written up). The five service corporations had no capital or physical assets or recources. All the employees of Grandview were transferred to the payroll of one or the other of the service corporations, although there was no physical change in the work location or nature of the services of such employees. Although the five service corporations used letterheads indicating that they operated at separate locations in El Monte, Alhambra and Monterey Park, only empty offices existed at such addresses with an empty desk and an empty file cabinet. The mail from these offices was picked up by an employee named Bacon who was considered to be the general manager of the service companies. Somewhat later, the addresses of all five service companies were transferred to 201 South Mission Drive, San Gabriel, but nothing was done physically except to change the address on the stationery. The actual bookkeeping work was done at the office of Backus or at 201 South Mission Drive, San Gabriel. Although the five service companies carried separate telephone listings, these were

hooked up so that they would ring and could be answered at the main location. Several people were employed to recover old invoices from Grandview and retype them with a 25 percent markup on materials and supplies and a 7 percent markup on payroll. Witness June Becking testified that she was employed by defendant Backus and worked out of his office and he gave her instructions with respect to invoices. 'I had to upgrade them and recopy them on blank sheets of paper and then stamp different service companies' name on top, label it.' By "upgrade' she meant add 25 percent. In September 1967 Backus gave her old invoices covering an eight - month retroactive period commencing in January 1967. 'I upgraded them all 25 percent and recopied the whole thing on another piece of paper, on the instructions of Backus.' He checked her work. Two girls were engaged in 'upgrading' process, "the invoices came direct from the hospital' not the suppliers, the invoices were backdated and the same changes were made in the general ledgers of the five service companies." (Slip Op., pp. 16-18).

The Magistrate has carefully considered the facts set forth above. Even accepting petitioner's contention that the first two sentences in the second full paragraph on page 16 of the Slip Opinion state conclusions, it is clear there are more than enough remaining facts, and reasonable inferences that can be drawn therefrom, to support a conclusion that petitioner had the specific intent to

commit the offense of which he was convicted. In the words of the Court of Appeal, there "was substantial evidence to support the trial court's conclusion that the five service corporations were not a legitimate business operation but were used by defendants as a vehicle to accomplish the illegal results claimed by the prosecutor." (Slip Op., p. 19). In no event can the record be considered so totally devoid of evidentiary support as to have denied petitioner due process of law. **Thompson v. City of Louisville, supra.**

Petitioner next contends he was denied due process of law in that his conviction was based (a) upon an unconstitutional statute and (b) upon standards so vague that it was impossible to know what conduct was prohibited. Since these contentions appear to be interrelated, they will be discussed together.

Initially, it must be observed that petitioner asserts that he is not attacking "the constitutionality per se of the precise statute under which he was convicted . . . ." (Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus, p. 9). Rather, the thrust of petitioner's argument appears to be that the Medi - Cal regulations relating to reimbursable costs for services performed were so vague and uncertain that the cost for which reimbursement could be sought was not determinable. Petitioner asserts that the situation became even more unclear when, in 1970, the California Court of Appeal held the Medi - Cal regulations governing reimbursement of nursing homes invalid because the

Medi - Cal administrator failed to hold hearings in order to establish a factual basis for such regulations. **California Assn. of Nursing Homes v. Williams,** 4 Cal. App. 3d 800, 84 Cal.Rptr. 590 (1970).

Finally, petitioner argues that the regulations authorize reimbursement for "resonable costs" and that criminal conduct could not be fastened upon petitioner based upon the trial court's interpretation of whether the costs for which reimbursement was sought was "reasonable," since this latter term has no fixed meaning.

The Magistrate believes the Court of Appeal correctly answered petitioner's contention when it stated:

> "Defendants contend that the regulations and standards used to promulgate acceptable cost items for inclusion in cost statements were so vague and uncertain that nursing homes were never quite sure just what items of cost to include therein; that the application of these vague standards with some precision at trial to the criminal charges was the prime factor in the conviction. They would equate the situation with criminal statutes which fail to describe ascertainable standards of guilt. We recognize that the Medi - Cal program had difficulty at its inception in determining equitable per diem rates that the state would pay and there were ever - changing regulations and statutory provisions. However, no regulation, or schedule, or accounting practice, recognized the validity of inflating accounts payable retroactively by a markup process as was done in this case or charging

> consultation fees when there were no documents to substantiate the necessity therefor, or the value to be assigned to the consultations. Defendants were well aware, as a result of the audit, of the basis for the criminal charges, and were sufficiently informed by the language of the indictment of the specific charges against them. There is no merit to the contention." (Slip Op., pp. 10-11)

The following language from the Court of Appeal's opinion is equally pertinent:

> " . . .Assuming **arguendo,** that defendants were not guilty of grand theft or conspiracy to commit grand theft, the overwhelming evidence demonstrates that they were guilty of conspiracy to use false evidence, known to be false. That alone, if all other evidence were disregarded, would support the conviction as to the count of conspiracy. (Count 1) Although we are aware that this count was drawn in the conjunctive - - conspiracy to commit grand theft **and** present false claims - - it has been held that the crime of conspiracy is a single offense, even though it may have had the object of violating two substantive crimes. (Citations omitted.) Where it is charged that defendants conspired to commit two or more substantive crimes, the offense of conspiracy is established and a conviction of conspiracy is warranted, if the proof establishes that there was a conspiracy to commit either one of such crimes, but does not require proof of both. (Citations omitted.)

"In our considered opinion, defendants, having knowingly presented fictitious and manufactured evidence in order to obtain an approved per diem rate, it becomes legally immaterial that they might have collected the same amount of money which they finally collected by honest and lawful evidence. The gravamen of the action is not in the amount of money collected, but in the conspiring to make intentional use of fraudulent evidence which was know to be such, for unlawful purpose. In our view, there is substantial evidence to support the convictions of conspiracy as charged in count I." (Slip Op., pp. 20 - 21.)

As indicate above, the Magistrate fully agrees with the reasoning of the Court of Appeal quoted above. Thus, in the view of the Magistrate, in the context of the present case it did not make any difference whether there was a fixed standard for determining Medi - Cal cost reimbursements, or whether the standard was "reasonable cost," or even whether the standard had been declared invalid (by reason of the decision in **California Ass'n of Nursing Homes v. Williams, supra).** The fact remains that the trial court was justified in concluding, based upon the evidence adduced at trial, that petitioner and his co-defendant entered into a conspiracy to improperly and unlawfully obtain monies to which there was no entitlement by submitting false and manufactured evidence. It must be remembered that petitioner was not charged with violating any regulation, but rather was charged with

violating the provision of the Penal Code prohibiting criminal conspiracies. Since there is ample evidence in this record to support the conclusion that petitioner was guilty of conspiring to commit grand theft and to submit false claims, it is of little moment that the Medi - Cal regulations were vague, ambiguous or invalid.

Petitioner's two final contentions require little discussion. Thus, petitioner contends he was denied due process of law in that "his conspiracy conviction was based solely upon one overt act. of which Petitioner was not found guilty. Petitioner conviction on Count III, filing a false claim, the only overt act supporting the conspiracy count was reversed on appeal because 'It was not the type of conduct prohibited by the provisions of Section 72.' (Petition, p. 5)

It is true, as petitioner asserts, that his conviction for violating count III, filing a false claim, was reversed by the Court of Appeal. This reversal followed from the court's conclusion that the document which was filed, as specified in count III, did not constitute a false claim within the meaning of Penal Code § 72. The Court did not conclude, however, that the physical act of filing the document had not occurred. Since the document specified in count III had in fact been filed, that filing can clearly be considered an overt act in furtherance of a conspiracy, irrespective of whether the filing of the document constituted a criminal act within the meaning of Penal Code § 72.

Petitioner finally contends that the acts engaged in by him could have been the subject of a civil audit, but under

no circumstances could have been the basis for a criminal prosecution. Petitioner cites no authority for this proposition and the Magistrate is aware of none. Accordingly, petitioner's claim must be rejected.

The Magistrate finds that by reason of the foregoing, it appears from the application that petitioner is not entitled to a writ of habeas corpus from this Court.

IT IS THEREFORE RECOMMENDED that an order be issued by the Court denying the petition.

Dated: July 8, 1977

HARVEY A. SCHNEIDER

[ORDER APPENDED]

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE ON PETITION FOR WRIT OF HABEAS CORPUS

The Court has reviewed the petition, the file, and the Report and Recommendation of the United States Magistrate who has reviewed the petition. The Court approves and adopts the Report as the opinion of the Court.

IT IS ORDERED that the petition for writ of habeas corpus is denied.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation and the Judgement herein, by United States mail, on the petitioner and on the Attorney General for the State of California.

Dated_____

WILLIAM P. GRAY
United States District Judge

FILED
AUG 30 1977
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICTOR J. BACKUS,

Petitioner

—vs—

LOS ANGELES SUPERIOR COURT,
et al.,

Respondent

No. CV 77-972-WPG (S)

FINAL REPORT and
RECOMMENDATION

A Proposed Report and Recommendation of the undersigned

A Proposed Report and Recommendation of the undersigned Magistrate and a Proposed Order and Proposed Judgement were served on the parties herein on July 18, 1977, as provided in General Order No. 104 - D of this Court.

No opposition has been filed thereto.

IT IS RECOMMENDED that the District Judge deem the Proposed Report and Recommendation lodged July 18, 1977 as final, that the recommendations contained therein be adopted as those of the Court, and that judgement be entered in favor of respondent.

Dated August 15, 1977

HARVEY A. SCHNEIDER
United States Magistrate

FILED
JUL 18 1977
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VICTOR J. BACKUS,

Plaintiff/Petitioner

vs.

LOS ANGELES SUPERIOR COURT,
et al.,

Defendant/Respondent

CASE NUMBER
CV 77-972-WPG (S)

NOTICE OF LODGING ON MAGISTRATE
REPORT & RECOMMENDATION
AND JUDGEMENT

TO: All Parties of Record;

Daniel Kallen, Esq.
1800 N. Highland Ave.
Suite 615
Hollywood, Ca. 90028

Donald F. Roeschke
Deputy Attorney General
800 Tishman Bldg.
3580 Wilshire Blvd
Los Angeles, Ca. 90010

You are hereby notified that pursuant to General Order 104-D the proposed report and recommendation, findings of fact and conclusion of law, and proposed judgement, copies of which are attached hereto, have been lodged by Magistrate Harvey A. Schneider in the above entitled case on July 18, 1977.

Any party having objections to the proposed report and recommendation and judgment shall, not later than twenty (20) days after service upon him, file and serve a written statement of objections with points and authorities in support thereof.

Any reply to the objections and points and authorities shall be in writing and filed not later than twenty (20) days from the date of service of objections.

No response to the reply will be received. When the reply has been received, or upon the expiration of the time for filing objections and/or reply, the magistrate may, in his/her discretion, calender the matter for oral argument or submit the proposed documents to the Judge to whom the case is assigned for final action.

Dated: 7-18-77
EDWARD M. KRITZMAN, CLERK
UNITED STATES DISTRICT COURT

BY _____ M - 37 7/74
Deputy Clerk

NOTICE OF LODGING OF MAGISTRATE'S
REPORT & RECOMMENDATION AND JUDGEMENT

DATE: JAN 15 1978

FILED
JAN 13 1978
EMIL E. MELFI JR. CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR J. BACKUS,
Petitioner-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
LOS ANGELES SUPERIOR COURT,
Respondents-Appellees

Before: WRIGHT, Circuit Judge

The appellant's motion for leave to file a late record on appeal is granted. The record received on November 30, 1977 shall be filed as of the date of receipt.

The appellant shall file the opening brief within 14 days hereof.

United States Circuit Judge

CR CAL 1/9/78

PROOF OF SERVICE

State of California

County of Riverside

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 years and not a party to the within entitled action: My business address is 612 N. Bush, Santa Ana, California 92701.

I served the within **PETITION FOR WRIT OF CERTIORARI** on the interested parties in said action, by placing three true copies in each of three sealed envelopes with thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

Honorable George Deukmejian
Office of Attorney General
3580 Wilshire Blvd., Room 90010
Los Angeles, California 90010

Edward W. Kritzman, Clerk
U.S. District Court
312 North Spring St.
Los Angeles, California 90012

Emil E. Melfi Jr., Clerk
U.S. Court of Appeals
Ninth Circuit
P.O. Box 547
San Francisco, California 94101

I CERTIFY under penalty of perjury that the foregoing is true and correct. Executed on February 8, 1980 at Santa Ana, California.

JACK GALLAGHER

FILED
NOV 14 1979
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VICTOR J. BACKUS,

Petitioner - Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, LOS ANGELES SUPERIOR COURT,

Respondents-Appellees.

No. 77-3775 MEMORANDUM

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: DUNIWAY, CHOY and SCHROEDER, Circuit Judges

There is no merit in this appeal.

Affirmed.